In *Yeo Long Seng* v. *Lucky Park (Pte.) Ltd.*[3] Winslow J. said (at page 23):

"It may well be said that conveyancing practice recognises a formal contract of sale concluded in the usual form and in accordance with the usual conditions of sale as being part of the normal machinery or procedure preceding a conveyance of land. The agreement in the schedule (to the Rules) now takes the place of the formal contract required in the case of sales by developers. This, however, is far from saying that there can never be any contract at common law if all the agreed terms between the parties are incorporated in correspondence or in some other way sufficient to constitute a sufficient note or memorandum evidencing agreement leaving no other terms to be yet agreed."

In the Malaysian Federal Court case of *Daiman Development Sdn. Bhd.* v. *Matthew Lui Chin Teck & Anor.*[4] the respondent was desirous of buying a house. He went to see the developers (the appellants), chose a house, paid a booking fee of $700 and signed a booking pro forma. According to the booking pro forma the parties agreed the purchase price of the house at $26,000. The respondent also agreed that on receiving notice by the respondents, he would sign the agreement for sale. Subsequently the appellants informed the respondent that the price of the house was increased to $35,100 because of "amendments to the building plans and increase of material and construction costs." The respondent did not agree to the increased price. The appellants informed the respondent that unless he agreed to pay the deposit based on the increased price, they would cancel the booking and refund the booking fee. The respondent thereupon applied to the court and the High Court gave judgment in his favour and ordered the developers on payment of the balance of the purchase price to transfer the property to the respondent. The appellants appealed. Suffian L.P. (delivering the judgment of the court) said at (page 243):

"The issue was whether the booking pro forma was a mere agreement to agree, as the defendants contended, or a firm contract of sale of the property, as the plaintiff contended. In our judgment, the pro forma was a firm contract. It identified the parties, it specified the property to be bought and its agreed price. True, the plaintiff was required to sign an agreement of sale to be prepared by the developers' solicitors and subject to the terms and conditions therein; but in fact the developers never showed the plaintiff the draft of any agreement. All the developers did was to announce unilaterally an increase in price for reasons which could not, in our view, affect the price to be paid by the plaintiff. The developers are bound by the Housing Developers (Control and Licensing) Rules, 1970, published as P.U. (A) 268 of 1970, and only details may be inserted into the further agreement. These details were never put to the plaintiff and he never had an opportunity to consider them; it was only after the plaintiff had rejected the draft of the further agreement that the developers might — we say might deliberately — call off the sale."

The appeal was dismissed.

I conclude, therefore, that the contract between the plaintiff and the defendants is not illegal and is enforceable.

The defendants have led no evidence as to why the court should not order specific performance. In my view specific performance is the proper remedy in this case and I so order.

Application allowed.

Solicitors: *Lee, Woo & Partners; G. Murugaiyan.*

FISCAL CONSULTANTS PTE. LTD. v. ASIA COMMERCIAL FINANCE LTD.

[O.C.J. (Lai Kew Chai J.) July 14, 1981]

[Singapore — Originating Summons No. 135 of 1981]

Contract — Loan agreement — Mortgage of property in favour of lender — Condition of mortgage — Redemption of mortgage only after expiry of one year and by giving 3 months' notice — Plaintiffs sought to redeem 3 months after loan — Interest imposed by lender for full period of one year and period of 3 months' notice of redemption — Whether clog on equity of redemption.

Contract — Waiver — Variation by express agreement or implied from conduct of parties.

The plaintiffs in this case entered into an agreement for sale and purchase dated September 12, 1978 with Hotel Merlin Singapore Ltd. to purchase two office units at Merlin Plaza (hereinafter referred as the "mortgaged properties"). On September 10, 1980 the defendants lent to the plaintiffs a sum of $200,000. The plaintiffs agreed to pay interest at the rate of 12½% per annum. The plaintiffs also agreed to pay the principal sum and interest by one hundred and eighty monthly instalments of $2,520 each. The first instalment was repayable on October 10, 1980. By way of security, the plaintiffs created in favour of the defendants an equitable mortgage over the mortgaged properties. A deed of assignment and a mortgage in escrow was executed by the plaintiffs in favour of the defendants. By Clause 3 of the mortgage, the plaintiffs agreed to perform and observe all the covenants and conditions set forth in the Memorandum filed by the defendants in the Registry of Titles. Sub-clause 2(j) of the Memorandum provided that "the mortgagor (the plaintiffs) shall only be entitled to redeem this security upon the expiry of one year from the date of these presents by giving to the mortgagee (the defendants) three months' notice of his intention to do so and upon payment of all moneys due to the company (the defendants) hereunder at the expiry of the notice including interest up to that date."

On December 26, 1980, the plaintiffs through their solicitors purportedly gave notice to the defendants to redeem the mortgaged properties and asked for the redemption statement. As a little over 3 months after the loan had elapsed, this notice was obviously in breach of sub-clause 2(j) of the Memorandum. On February 9, 1981 the defendants sent to the plaintiffs the redemption statement and required the plaintiffs to pay the sum of $231,645.19. This meant that the defendants were asking for interest for the full period of one year and the period of 3 months' notice of redemption under sub clause 2(j) of the Memorandum. The plaintiffs expressed shock at the defendants' attempt to charge interest up to December 31, 1981. The plaintiffs referred to an earlier transaction regarding the redemption of the Sim Lim Tower Properties between the parties when in similar circumstances the defendants had waived their rights under a clause similar to sub-clause 2(j) of the Memorandum and had not charged interest for the full period. The plaintiffs urged the defendants to adopt a similar course.

The plaintiffs informed the defendants that they had sold the mortgaged properties and that completion under that sale was scheduled to take place on February 18, 1981. They therefore required the defendants to complete the redemption on that date. By a letter dated February 13, 1981 the plaintiffs stated that they would pay the defendant the sum of $231,645.19 on February 18, 1981 "strictly under protest and objection to redeem" the said properties. In their reply dated February 18, 1981, the defendants stated that they did not agree to the waiver of the interest for the full period of 15 months or to any reduction thereof. They insisted on their strict rights under sub-clause 2(j) of the Memorandum. They also contended that their concession in not charging full interest in respect of the redemption of the Sim Lim Tower Properties was not meant to be a precedent. On the following day the plaintiffs paid the entire sum of $231,645.19 to the defendants and again expressing the payment to be "strictly under protest and objection". The mortgage was redeemed on February 20, 1981. The plaintiffs then commenced the present proceedings to seek, *inter alia*, a declaration that the defendants were not entitled to charge as interest the sum of $22,660.43 in addition to the repayment of the principal

sum and interest due upon the redemption of the plaintiffs' mortgaged property.

The plaintiffs made three contentions (i) that the defendants by allowing the premature redemption had waived their rights; (ii) that there was no variation; & (iii) that, even if there was a variation, the terms thereof were harsh and unconscionable and a clog on the equity of redemption.

Held, dismissing the plaintiffs' claims: (1) that there was no waiver as the defendants had not abandoned their strict rights under sub-clause 2(j) of the Memorandum;

(2) that there was a variation which was expressed or which was implied from the conduct of both parties if the interest for the full period which the defendants had insisted amounted to or must be deemed to be acceptance of the defendants' offer. It would be wrong to allow the plaintiffs to say that their protest and objection had successfully qualified their acceptance;

(3) that the additional sum of $22,660.43 which was imposed in exchange for the defendants' agreement to waive their rights under sub-clause 2(j) was not harsh and unconscionable nor a clog on the equity or redemption.

Cases referred to:-

(1) *Banning* v. *Wright (Inspector of Taxes)* [1972] 1 W.L.R. 972, 980, H.L.

(2) *Knightsbridge Estates Ltd.* v. *Byrne* [1939] Ch. 441.

(3) *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1967] 3 W.L.R. 605.

(4) *Kreglinger* v. *New Patagonia Meat and Cold Storage Company Ltd.* [1914] A.C. 25.

(5) *Multiservice Bookbinding Ltd. & Ors.* v. *Marden* [1978] 2 W.L.R. 535.

ORIGINATING SUMMONS.

Ronald Lee Kum Seng for the plaintiffs.

Seah Geok Keow for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: The plaintiffs are seeking in this action a declaration that the defendants are not entitled to charge as interest the sum of $22,660.43 in addition to the repayment of the principal sum and interest due upon the redemption of the plaintiffs' mortgaged property. They also seek a consequential order that the defendants repay to them the said sum paid to the defendants under protest and objection together with interest at the rate of twelve per cent per annum from February 20, 1981 to the date of payment.

The plaintiffs are a company incorporated in Singapore. The defendants are a finance company incorporated in Singapore.

By an agreement for sale and purchase made on September 12, 1978 between Hotel Merlin Singapore Limited of the one part and the plaintiffs of the other part, the plaintiffs agreed to purchase the office units known as Unit Nos. 313 and 314 on the 14th Floor of the building known as "Merlin Plaza", Beach Road, Singapore (which units are hereinafter referred to as "the mortgaged properties").

On September 10, 1980, the defendants lent to the plaintiffs the sum of $200,000. The plaintiffs agreed to pay interest at the rate of twelve and a half per cent per annum. The plaintiffs also agreed to pay the principal sum and interest by one hundred and eighty (180) monthly instalments of $2,520 each. Although the date of the first instalment was left blank in the documents, it was presumably agreed and intended by both parties that it was repayable on October 10, 1980. At all times material to these proceedings strata titles relating to the mortgaged properties were not issued. By way of security and as is usual in transactions of this nature in Singapore the plaintiffs created in favour of the defendants an equitable mortgage over the mortgaged properties.

By a deed of assignment dated two days after the loan was disbursed the plaintiffs assigned absolutely to the defendants all their rights and interest in and relating to the mortgaged properties under the said agreement for sale and purchase subject to the usual proviso for re-assignment upon full payment of the principal sum and all other monies secured thereunder. In addition to the deed of assignment, the plaintiffs executed in favour of the defendants a mortgage in escrow and in the form as prescribed under the Land Titles (Strata) Act, Cap. 277. By Clause 3 of the Mortgage, the plaintiffs agreed to perform and observe all the covenants and conditions set forth in the Memorandum filed by the defendants in the Registry of Titles and numbered as MM/17.

Sub-clause 2(j) of the Memorandum provided as follows:

"The Mortgagor (the Plaintiffs) shall only be entitled to redeem this security upon the expiry of one year from the date of these presents by giving to the Mortgagee (the Defendants) three (3) months' notice of his intention to do so and upon payment of all monies due to the Company (the Defendants) hereunder at the expiry of the notice including interest up to that date."

The expression "the date of these presents" refers either to August 22, 1980 on which the Memorandum was signed by the defendants or to September 12, 1980 which was the date of the deed of assignment. The former date is clearly inapplicable. Both parties took the stand that the expression referred to September 10, 1980 which was, as it will be recalled, the date of the disbursement of the loan. Neither party to these proceedings addressed the court whether the notice of redemption under sub-clause 2(j) could be given during the period of one year from the date of the presents or whether it could only be given after the expiry of the period of one year. In view of my findings as hereinafter appearing, and on the facts as had happened, nothing turns on this issue.

On December 26, 1980, the plaintiffs through their solicitors purportedly gave notice to the defendants to redeem the mortgaged properties and asked for the redemption statement. As the period of only a little over three months after the disbursement of the loan had elapsed, this notice was obviously in breach of sub-clause 2(j) of the Memorandum. After several reminders, the defendants by their solicitor's letter of February 9, 1981 sent to the plaintiffs the redemption statement and required the plaintiffs to pay the sum of $231,645.19. The computations in the redemption statement disclosed that the defendants were asking for interest on the loan and overdue interest for the period of some fifteen months. The computation was worked out on the basis as if sub-clause 2(j) of the Memorandum was to have run its full course and that the defendants were entitled to interest for the full period of one year and the period of three months' notice of redemption. On receipt of the redemption statement the plaintiffs expressed shock

at the defendants' attempt to charge interest up to December 31, 1981. The plaintiffs also referred to an earlier transaction between the parties when in similar circumstances the defendants had waived their rights under a clause similar to sub-clause 2(j) of the Memorandum and had not charged interest for the full period. In that transaction, the plaintiffs had also created equitable mortgages in favour of the defendants over certain units in the Sim Lim Tower. Although the plaintiffs had prematurely redeemed the properties in Sim Lim Tower, the defendants did not insist on the clause similar to sub-clause 2(j) of the Memorandum running its full course and had not charged interest for the full period. The plaintiffs urged the defendants to adopt a similar course.

The plaintiffs also informed the defendants that they had sold the mortgaged properties and that completion under that sale was scheduled to take place on February 18, 1981 and accordingly required the defendants to complete the redemption on that date. The plaintiffs at the end of their solicitors' letter of February 13, 1981 stated as follows:

"We shall therefore pay your clients the sum of $231,645.19 on February 18, 1981 strictly under protest and objection to redeem the above properties. Thereafter, if your instructions are that your clients do not wish to refund the sum of $28,997.93 to our clients or if we do not hear from you within seven (7) days thereof, kindly let us know whether you have instructions to accept service."

The protest and objection were elaborated in the annexure to the letter of the plaintiffs' solicitors. It was a copy of a letter dated November 11, 1980 and addressed to the defendants' solicitors relating to the redemption accounts of the said Sim Lim Tower properties. In that letter, the plaintiffs asserted that the sub-clause similar to sub-clause 2(j) of the Memorandum by operation had imposed a punitive pecuniary penalty on the plaintiffs' right of redemption and was therefore an oppressive and unconscionable clause which was void in law. The validity of that clause was questioned.

On February 18, 1981, the defendants' solicitors replied to the effect that the defendants did not agree to the waiver of the interest for the full period of fifteen months or to any reduction thereof. They insisted on their strict rights under sub-clause 2(j) of the Memorandum. They also pointed out that their concession in not charging full interest in respect of the redemption of the Sim Lim Tower properties was not, and was not meant to be, a precedent. On the following day, the plaintiffs paid the entire sum of $231,645.19 to the defendants again expressing the payment to be "strictly under protest and objection". The engrossed deed of re-assignment was forwarded on an urgent basis to the defendants for execution. The redemption of the mortgaged properties took place on February 20, 1981. The plaintiffs commenced these proceedings for the recovery of the sum of $22,660.43, giving credit for the sum of $2,261.16 which was refunded by the defendants shortly after the redemption.

Counsel for the plaintiffs opened his arguments by submitting that the defendants had waived their rights under sub-clause 2(j) merely by the act of allowing, as they did, the plaintiffs to redeem the mortgaged properties on February 20, 1981. It was observed that the sub-clause and the rest of the mortgage documents were silent and did not provide that the defendants were entitled to charge interest in the event of a premature redemption. "Waiver" is a vague term which has different meanings in different contexts. So far as the law of contract is concerned "it is most commonly used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived": 9 *Halsbury's* Laws of England, 4th ed. para. 571. A good description of "waiver" is by Lord Hailsham of St. Marylebone L.C. in *Banning* v. *Wright (Inspector of Taxes*[1]:

"Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach. I cannot construe 'waiver' as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior licence is required by the terms of the contract."

The defendants in this case did not abandon their rights under sub-clause 2(j) at all. On the contrary, they had made it plain from beginning to end that they required interest to be paid for the full period of fifteen months, notwithstanding but as the price for the premature redemption. It is true that the defendants did not expressly stipulate that the plaintiffs were in breach in tendering the notice of redemption prematurely. It is also to be noted that the defendants did not expressly stipulate that they would only allow premature redemption if the interest for the full period of fifteen months were tendered and paid unconditionally. If that had happened, it would have been the end of the matter. What had happened was that redemption had taken place after the plaintiffs tendered the full sum, albeit "strictly under protest and objection."

The issue therefore arises whether there was a variation of the contract under which it was agreed or the parties in law could be said to have agreed that as consideration for the defendants' waiver of their rights under sub-clause 2(j) the plaintiffs would pay the sum of $22,660.43 for the privilege of prematurely redeeming the mortgaged properties. It was submitted for the plaintiffs and there was no controversy that parties to a contract may by agreement vary the terms of that contract and that the variation must itself possess the characteristics of a valid contract. Counsel for the plaintiffs submitted that in this case there was only a unilateral notification on the part of the defendants to impose interest for the full period. I cannot accept this argument. I hold that there was a variation which is expressed or which is to be implied from the conduct of both parties. The defendants had right up to the day of redemption consistently insisted on interest for the full period as if sub-clause

2(j) had run its full course. The plaintiffs desperately needed to redeem prematurely in order to complete the sale of the mortgaged properties. Although they protested and objected, they paid up and received the redemption earlier than they were entitled to under the terms of the mortgage. In relation to the protest and objection, it should be noted that it was founded solely on the plaintiffs' argument that sub-clause 2(j) in seeking to provide for a postponement of the right to redeem was a clog on the equity of redemption and was therefore void. It is not without significance that this assault on the validity of sub-clause 2(j) was abandoned in the course of arguments as it was clearly unsound in law: see *Knightsbridge Estates Ltd.* v. *Byrne.*[2] As far as I am concerned, that protest and objection therefore goes out of the window. The plaintiffs' payment of the interest for the full period amounted to or must be deemed to be acceptance of the defendants' counter-offer. It seems to me to be wrong now to allow the plaintiffs to say that their protest and objection had successfully qualified their acceptance of the defendants' requirement of interest for the full period. This would in effect have allowed the plaintiffs to steal a march on the defendants. I therefore hold that there was a variation by express agreement or the variation is to be implied from the conduct of the parties.

If there was a variation, the plaintiffs contended finally that the imposition of the full interest in effect was harsh and unconscionable, punitive and a clog on the equity of redemption. The defendants, it was argued, was only entitled to charge interest for six months and seventeen days. The plaintiffs alleged that to charge the additional sum of $22,660.43 on the loan of $200,000 for the short period would mean that the defendants were charging interest at the excessive rate of forty one per cent per annum on a secured loan. The prevailing market rate, it was stated from the Bar, was between 14% to 17% per annum on a secured loan. What should be pointed out at once is that there is a basic flaw in this argument. The additional sum was imposed in exchange for the defendants' agreement to waive their rights under sub-clause 2(j). This was the sum the defendants would have earned if the loan had run its full course under the sub-clause.

In support of this contention, the plaintiffs relied heavily on *Cityland and Property (Holdings) Ltd.* v. *Dabrah.*[3] But there are several striking differences between Cityland and the facts in these proceedings. Parties there were not trading concerns. Goff J. (as he then was) found that the borrower was in an unequal bargaining position and was only able to raise £600 on his own to help purchase from the lender the house, of which he was a sitting tenant. He only borrowed £2,900 but he was required to repay £4,553. An advanced premium, which was 57% of the loan, was imposed. Small wonder that it was held that the collateral advantage was harsh and unconscionable. The present case does not contain any of those elements which are morally reprehensible.

The law on clogs on the equity of redemption and collateral advantages were fully reviewed by the House of Lords in *Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited*[4]: see the speech of Lord Parker at pages 49-50. At page 60 Lord Parker in summary said:

> "My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantgae, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem."

A good illustration of how this enunciation of the law is worked out is to be found in *Multiservice Bookbinding Ltd. & Ors.* v. *Marden*[5] which the defendants should have cited in reply. Multiservice bears striking resemblance to the present case. It was a loan taken by a trading corporation which was secured by a mortgage dated September 7, 1966 of the borrower's business premises. The loan was guaranteed by two directors of the borrower company. Interest was agreed to be two per cent per annum above the minimum lending rate of a bank named. As is well-known, this meant that the rates of interest had fluctuated from time to time. The mortgage also provided so far as are material as follows: —

(1) that interest was payable throughout the period of the loan on the whole sum of £36,000 notwithstanding the capital repayment made;

(2) that the arrears of interest were to be capitalised after 21 days and were themselves to bear interest from that date to the date of payment;

(3) that the loan could neither be called in nor redeemed during the first ten years; and

(4) that it was made a condition, by clause 6, that any sum payable by way of principal or interest was to be "increased or decreased proportionately if (at the stipulated times) the rate of exchange between the Swiss Franc and the pound Sterling shall vary by more than three per cent from the rate of 12.07 5/8 Franc to £1."

The rate of exchange at the beginning of October 1976, when a redemption statement was prepared, was just over 4 Swiss Franc to the pound. By that date, some $24,355.57 had been repaid on the capital account. But the payment only reduced the nominal amount of the debt by only £15,000. This left £21,000 of the loan to be discharged. Adding the Swiss Franc uplift, the total redemption amount required was £63,202.65. The average rate of interest all told over the whole of the 10 years would have worked out to 16.01 per cent per annum.

The other way, although an artificial way, of looking at the figures would produce the effect of the borrowers having to pay 33.33 per cent interest over the period of 10 years on the loan of £36,000. It should be emphasised that this approach would have treated the Swiss Franc uplift paid on the capital repayments as a charge on the loan which it was not.

Browne-Wilkinson J. held that the Swiss Franc uplift on the facts was not a premium, that the parties were of equal bargaining power and that the terms, which might have been unreasonable, were not unfair,

oppressive or morally reprehensible. He declined to intervene.

I also decline to intervene in all the circumstances of this case. The claims of the plaintiffs are accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Ronald Lee & Co.; Lim Sin & Thiam Beng.*

MALAYSIAN REPORTS

RE KHOO BOO GONG, DECD. KHOO TENG SEONG v. TEOH CHOOI GHIM & ORS.

[F.C. (Chang Min Tat, Salleh Abas & Abdul Hamid F.JJ.) January 16 & February 28, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 22 of 1980]

Probate and Administration — Application to revoke appointment of executor — Absence of executor from jurisdiction — Revocation of probate — No sufficient cause shown — Probate and Administration Act, 1959, s. 34.

In this case the respondent had applied for the revocation of probate granted to the executors of the estate and the removal of the appellant as executor. The main reason for the application was that the appellant was resident in Australia. The application was allowed in the High Court and the appellant appealed.

Held: (1) absence from jurisdiction of an executor who is always available and who has done what needed to be done, albeit with some lapses, through capable and suitable solicitors, cannot amount to a cause, much less, a sufficient cause for revoking the grant to him;

(2) the respondents have not made a case for the revocation of the probate granted to the appellant and the appeal must therefore be allowed.

Cases referred to:-

(1) *In the goods of William Loveday* [1900] P. 154.
(2) *In the Estate of O. RM. M.S.M. Sevugan Chettiar decd.* [1949] M.L.J. 254.
(3) *In the Estate of Cope* [1954] 1 All E.R. 698.
(4) *Hill* v. *Bird* 82 E.R. 563.
(5) *In re Covell* (1889) 15 P.D. 8.
(6) *In re Bradshaw* (1887) 13 P.D. 18.

FEDERAL COURT.

Mrs. De Silva for the appellants.

Miss C.H. Liew for the respondents Nos. 1 and 4.

Varghese George for respondents Nos. 2 and 3.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal by an executor whose appointment has now been revoked by the High Court at the instance of his co-executor and three other beneficiaries. The appellant is the son of the co-executor, in fact, her eldest son, but appears to have fallen out of favour with her and to have antagonised his other brothers and sisters, or most of them. It is all very unfortunate.

By his will made on December 31, 1974, the testator, Khoo Boo Gong, appointed his wife, Madam Teoh Chooi Ghim, and their eldest son, the appellant, executors and trustees of his estate. He gave no power of appointment. Being apparently aware that the appellant was even then contemplating settling in Australia, he directed in his will that if the appellant should reside outside Malaysia at the time of his death, he, the appellant, should grant a power of attorney in respect of his duties as executor to anyone of his brothers, sisters or half-sisters residing in Malaysia except one of them who was expressly named. The testator died on June 12, 1975, leaving him surviving a wife, a concubine and in all 17 children, including the appellant.